93-465

Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JAMES A. SCARFONE,

Petitioner,

v.

STATE BOARD OF LAW EXAMINERS,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the State Board of Law Examiners' application of the permanent residency requirements of MCL 600.934(1) to applicants of the State Bar of Michigan is unconstitutional on its face, or as applied to the petitioner, under the circumstances presented?

A. Whether the State Board of Law Examiners' application of the permanent residency requirements of MCL 600.934(1) to the Petitioner violates the federal supremacy clause?

B. Whether the State Board of Law Examiners' application of the permanent residency requirements of MCL 600.934(1) to the Petitioner violates the Petitioner's state and federal constitutional rights under the equal protection clause of the U.S. Constitution?

1. Whether the Petitioner has voluntarily made himself subject to Michigan and/or Federal jurisdiction and has begun to develop substantial connections with our society?

2. Whether the State Board of Law Examiners application of the permanent residency requirement of MCL 600.934(1) to the Petitioner is necessary (or narrowly tailored) to serve a compelling state interest?

3. Whether the State Board of Law Examiners application of the permanent residency requirement of MCL 600.934(1) to the Petitioner is rationally related to a legitimate state purpose?

C. Whether the State Board of Law Examiners' application of the permanent requirements of MCL 600.934(1) to the Plaintiff violates the federal commerce clause?

II. Whether the State Board of Law Examiners' application of the permanent residency requirements of MCL 600.934(1) to the Petitioner violates the Petitioner's Federal Statutory Rights protected by 42 USC § 1981?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the same as those listed in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

I. THIS IS A MATTER OF FIRST IMPRESSION, INVOLVING AN ISSUE OF NATIONAL/INTERNATIONAL IMPORTANCE WHICH REQUIRES UNIFORMITY AMONG THE STATES, AND THE STATE AND FEDERAL COURTS WHICH DEAL WITH THE ISSUE THROUGHOUT OUR STATES AND NATION 7

II. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENTS OF MCL 600.934(1) TO APPLICANTS OF THE STATE BAR OF MICHIGAN IS UNCON-

STITUTIONAL ON ITS FACE, OR AS APPLIED TO THE PETITIONER, UNDER THE CIRCUMSTANCES PRESENTED . 8, 9

A. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENTS OF MCL 600.934(1) TO THE PETITIONER VIOLATES THE FEDERAL SUPREMACY CLAUSE 9

B. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENTS OF MCL 600.934(1) TO THE PETITIONER VIOLATES THE PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION 12

1. THE PETITIONER HAS VOLUNTARILY MADE HIMSELF SUBJECT TO MICHIGAN AND/OR U.S. JURISDICTION AND HAS BEGUN TO DEVELOP SUBSTANTIAL CONNECTIONS WITH OUR SOCIETY 14

2. THE STATE BOARD OF LAW EXAMINERS APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENT OF MCL 600.934(1) TO THE

PETITIONER IS NOT NECESSARY (OR NARROWLY TAILORED) TO SERVE A COMPELLING STATE INTEREST 17

3. THE STATE BOARD OF LAW EXAMINERS APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENT OF 600.934(1) TO THE PETITIONER IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE 22

C. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENTS OF MCL 600.934(1) TO THE PETITIONER VIOLATES THE FEDERAL COMMERCE CLAUSE 24

III. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE RESIDENCY REQUIREMENTS OF MCL 600.934(1) TO THE PETITIONER VIOLATES THE PETITIONER'S FEDERAL STATUTORY RIGHTS PROTECTED BY 42 U.S.C. §1981 28

Conclusion 30

Appendix 1a

TABLE OF AUTHORITIES

Page

Amanda Acquisitions Court v Universal Foods Corp,
708 F Supp. 984 (In WIS, 1989) affirmed
877 F 2d 496 26

Ambach v Norwick,
441 U.S. 71, 72-74; 99 S. Ct. 1589, 1592-1593
(1979) 14, 19

Bachus Imports, Ltd v Diaz,
468 U.S. 263, 268-272; 104 S. Ct 3049, 3053,
3055 (1984) 25

Baird v. State Bar of Arizona,
91 S Ct 702, 292 (1971) 23

Barnard v. Thorstenn,
109 S Ct 1294 (1989) 8, 18, 23

Bernal v Fainter,
467 U.S. 216; 104 S. Ct. 2312, 2315-2316 (1984) . 17

Bhandari v First National Bank of Commerce,
801 F. 2d 1082 (CA 5 1987) 29

Blythe v Hinckley,
180 U.S. 333, 21 S. Ct. 390, 45 L. Ed. 557 (1901) . 20

Board v Flores D'Otero,
426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed.
2d 65 (1976) 21

Brotherhood of Railroad Trainmen v Virginia Ex
Rel Virginia State Bar, 377 U.S. 1, 6 (1964) 9

Campeau Corp v Federated Department Stores,
679 F. Supp. 735 (SD Ohio, 1988) 25, 26

Carlson v Landon,
342 U.S. 524, 535; 72 S. Ct. 525, 531 (1952) 14

Chicago Blower Corporation v. Air Systems Associates,
623 F2d 798 (ED Mich, 1985) 16

Chicago, et al v Public Service Commission,
332 Mich 291 (1952 25

City of Philadelphia v New Jersey,
437 U.S. 617, 624-625; 98 S. Ct. 2531;
2535 (1978) 25

Commercial Standard Fire Marine Co v Galindo,
484 SW. 2d 635, 636-637 (Texas App., 1972) 14

Cook Coffee Company v. Village of Flushing,
267 Mich 131 (1934) 22

Crane v New York,
239 U.S. 195, 36 S. Ct. 85, 60 L. Ed. 218 (1915) . 20

CS XT, Inc. v Pitz,
883 F 2d 468 (CA 6, 1989) 25

CTS Corp v Dynamics Corp of America,
481 U.S. 69, 87-90; 107 S. Ct. 1637,
1648-1651 (1987) 26

Dingemans v Board of Law Examiners,
568 A 2d 354, 356-357 (VT, 1989) 6, 8, 10, 12

Doe v Department of Social Services,
439 Mich 650, 662 FN 19 (1992) 14

El Souri v DSS,
429 Mich 203, 208-210 (1987) 14, 17, 18

Ex Parte Garland,
4 Wall 333, 379; 18 LED 366 (1867) 23

Frazier v. Heebe,
107 S Ct 2607 (1987) 8, 18

Frick v Webb,
263 U.S. 326, 44 S. Ct. 115, 68, L. Ed. 323 (1923) 19

Glicker v. Michigan Liquer Control Commission,
160 F2d 96, 98-100 (CA6, 1947) 13

Goldstein v City of Hamtramck,
227 Mich 263, 267-269 (1924) 22

Gooley v. Jefferson Beach Marina,
177 Mich App 26 (1989) 16

Graham v Richardson,
403 U.S. 365, 377-380; 91 S. Ct. 1848,
1854-1856 (1971) . . . 8, 10, 11, 14, 17, 18, 20, 21, 28

Hauenstein v Linham,
100 U.S. 483, 25 L. Ed. 628 (1880) 20

In Re: Griffiths,
413 U.S. 717; 93 S. Ct. 2851 (1973) . . 8, 12, 21, 24

In Re: Houlihan,
389 Mich 665 (1973) 21, 24

Japan Line Ltd v City of Los Angeles,
441 U.S. 434; 99 S. Ct. 1813 (1978) 25

Johnson v Avery,
393 U.S. 483, 490 F11 (1969) 9

Johnson v. Eisentrager,
70 S Ct 936, 940 (1950) 13

Keenan v. Board of Law Examiners of the State of North Carolina,
317 F Supp 1350, 1353-1356 (DC, NC, 1970) . 15, 23

Landon v. Plasencia,
103 S Ct 321, 329 (1982) 13

Lewis v BTINV Managers, Inc.,
447 U.S. 27; 100 S. Ct. 209 (1980) 25

Louis v. Supreme Court of Nevada,
490 F Supp 1174, 1182-1183 (DC Nevada, 1980) . 23

Martinez v Fox Valley Buslines,
17 Fed. Sup. 576 (DC il (sic) 1936) 14

Mathews v Diaz,
426 U.S. 67 78-88; 96 S. Ct. 1883, 1890-1895,
F 17, 24 (1976) 10, 14, 22, 27, 29

Mathews v. Lucas,
96 S Ct 2755, 2762 (1976) 18

McCready v Virginia,
4 Otto 391, 94 U.S. 391, 24 L. Ed. 248 (1877) . . . 20

Miranda v Nelson,
351 F Supp. 735, 740 (DC AZ 1972) 21

Mohammed v Parks,
352 F. Supp. 518, 521 (DC MA 1973) 21

Morgan v Virginia,
328 U.S. 373, 377; 66 S. Ct. 1050 (1946) 26

Nyquist v. Mauclet,
97 S Ct 2120, 2125 (1977) 18, 21

Ohio Ex Rel Clark v Deckebach,
274 U.S. 392, 47 S. Ct. 630, 71 L. Ed. 1115; (1927) 20

Oyama v California,
332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249 (1948) . 20

Patsone v Pennsylvania,
232 U.S. 138, 34 S. Ct. 281, 58 L. Ed. 539 (1914) . 20

People v Boblo Excursion Company,
317 Mich 686 (1947) 25

Plyler v. Doe,
102 S Ct. 2382, 2392-2394 (1982) 13, 14, 17

Porterfield v Webb,
263 U.S. 225, 44 S. Ct. 21, 68 L. Ed. 278 (1923) . 19

Potts v. Honorable Justices of Supreme Court of Hawaii,
322 F Supp 1392, 1397-1399 (DC Hawaii, 1971) . . 23

Russian Volunteer Fleet v. U.S.,
51 S Ct 229 (1931) 13

Schware v. Board of Bar Examiners,
77 S Ct 752, 756, FN5 (1957) 23

Sestric v. Clark,
765 F2d 655 (CA7, 1985) 23

Shugareman v Dougal,
413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2d
853 (1973) 21

Sifers v. Horen,
385 Mich 195 (1971) 16

South Central Timber Development, Inc. v Wunnicke,
467 U.S. 82; 104 S. Ct. 2237 (1984) 25

State Bar v Cramer,
399 Mich 116, 134 (1976). 9

Supreme Court of New Hampshire v. Piper,
105 S Ct 1272 (1985) 18

Supreme Court of Virginia v. Freedman,
108 S Ct 2260 (1988) 8, 18

Takahashi v Fish and Game Commission,
334 U.S. 410, 418-420; 68 S CT 1138,
1142-1143 (1948) 8, 10, 11, 20, 21, 24, 28

Teitscheid v Leopold,
342 F. Supp. 299, 302-303 (DC VT, 1971) . . . 12, 21

Terraca v Thompson,
263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923)20, 21

Toll v Moreno,
485 U.S. 1, 9-14; 102 S. Ct.,
2977, 2982-2984 (1982) 10, 11, 22, 26

Truax v Raich,
239 U.S. 33, 36 S. Ct. 7, 60 L.
Ed. 131 (1915) 12, 19, 21, 24

U.S. v. Verdugo-Uriquidez,
110 S Ct 1056, 1063-1064 (1990) 13

Wardair Canada, Inc. v Florida Department of Revenue,
477 U.S. 1; 106 S. Ct. 2369 (1986) 25

Webb v O'Brien,
263 U.S. 313, 44 S. Ct. 112, 68 L. Ed. 318 (1923) . 19

Webster v. Wofford,
321 F Supp 1259, 1261-1262 (ND Georgia, 1970) . 23

Western Union v PSC,
127 Mich App. 88 93-94 (1983) 26

Yick Wo v Hopkins,
118 U.S. 356; 6th S. Ct. 1064,
1070-1072 (1886) 14, 19, 21, 28

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES A. SCARFONE,

Petitioner,

v

STATE BOARD OF LAW EXAMINERS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

The Petitioner respectively prays that a writ of certiorari issue to review the order of the Michigan Supreme Court which denied the Petitioner's Complaint for Mandamous and/or Superintending Control as against the respondent State Board of Law Examiners.

OPINIONS BELOW

The Michigan Supreme Court did not issue an opinion in support of its order denying the relief requested by the Petitioner in the case below.

BASIS FOR JURISDICTION

The Michigan Supreme Court issued its order on June 22, 1993. This Court has jurisdiction to review the order of the Michigan Supreme Court under 28 U.S.C. §1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Article I, Section A:

> To regulate commerce with foreign nations, and among the several states, and the Indian tribes;
>
> To establish an uniform rule of naturalization...

U.S. Constitution, Article 6, Clause 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof.

U.S. Constitution, Amendment 14:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; ... nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1981:

> All persons within the jurisdiction of the United States shall have the same right in every State ... to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens... .

8 U.S.C. §1101(a)(32):

> The term "profession" shall include but not be limited to... lawyers... .

8 U.S.C. §1184 provides in pertinent part that:

> (a)(1) the admission to the United States of any alien as a non-immigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe... .
>
> (e) ... may be admitted for such purpose under regulations of the Attorney General promulgated after consultation with the Secretaries of State and Labor... .

MCL 600.934(1):

> A person is qualified for admission to the Bar of this State who proves to the satisfaction of the Board of Law Examiners that he or she... is a [permanent] resident of one of the States or Territories or the District of Columbia... .

MCL 600.705, states in pertinent part:

> The existance of any of the following relationships shall constitute a sufficient basis of... limited personal jurisdiction over the individual...:
>
> 1. The transaction of any business within the State;...
>
> 3. The ownership, use, or possesion of real or tangible personal property situated within the State;...

MCR Rules of Court, 1993; Rules for the Board of Law Examiners 1-2, pp 1175-1176:

> An applicant for admission to the practice of law must a) be 18 years of age or older; b) possess good moral character; and c) have completed, before entering law school, at least 60 semester hours or 90 quarter hours toward and undergraduate degree from an accredited school or while attending an accredited junior or community college... .
>
> ...[A]n applicant must obtain a JD, LLB, or LLM

degree from a reputable and qualified law school that 1) is incorporated in the United States, its territories, or the District of Columbia;... .

STATEMENT OF THE CASE

This case is an appeal from an original action filed in the Michigan Supreme Court for a Writ of Mandamous/Superintending Control against the State Board of Law Examiners, pursuant to the requirements of MCR 7.304. The State Board of Law Examiners is a judicial agency, being governed by the Supreme Court of Michigan and empowered to regulate admission to the State Bar of Michigan pursuant to the provisions of the "Rules for the Board of law Examiners".

The Petitioner, James A. Scarfone, is a Canadian citizen, permanently residing at 2093 Yrpes Boulevard, Windsor, Ontario. He is a graduate of University of Windsor and the Detroit College of Law. He took and **passed the July 1990 Michigan Bar exam**. He is also a member in good standing of the State Bar of Florida. James Scarfone is currently allowed to come to the United States, at will, and holds a valid Trade Canada or TC Visa, for Canadian professionals. He has a Michigan business office at 3612 Penobscot Building, Detroit, Michigan 48226. When in Michigan, he temporarily resides with relatives at 17 Sycamore Lane, Grosse Pointe, Michigan 48230. In addition, he pays Michigan State property taxes, vis-a-vis his leasehold interest in the Penobscot Building property, and the payment of rent to his landlord.

As a result of the foregoing, the Petitioner is subject to either the in rem, quasi in rem, and/or inpersonam jurisdiction of the United States government, State of Florida and/or the State of Michigan. He is, therefore, also entitled to the equal

protection and due process "protections" enjoyed by our own citizenry, as a matter of law.

Mr. Dennis Donohue, Assistant Secretary of the Michigan State Board of Law Examiners (hereinafter State Board of Law Examiners), has indicated, on behalf of the State Board of Law Examiners, that the Petitioner cannot be certified for admission to the State Bar of Michigan solely because he does not meet the permanent residency requirement set forth for admission in MCL 600.934(1), stating in a series of letters that:

> 1. This is to inform you that pursuant to MCL 600.934, one must be a resident of the United States to be eligible for admission to practice law in the State of Michigan. The Board has interpreted that statutory provision to require that one be a holder of a non-immigrant working permanent resident visa, otherwise known as a green card....
>
> 2. This is to reiterate the Board's position that the Canadian/United States Free Trade Agreement has no effect [on] (sic.) the Board's requirement, that in order for a Canadian citizen to be eligible for admission to practice in Michigan, the applicant must hold a non-immigrant working permit resident visa, otherwise known as a green card, entitling that person to be a resident of the United States.
>
> 3. Enclosed is a copy of correspondence to Robert Cullgren, Chairperson of the International Law Section Counsel of the State Bar of Michigan. In addition, any thoughts you might have in our correspondence to Mr. Cullgren, the Board

would be interested in any information you have on the requirements for Michigan attorneys seeking admission to practice in Ontario, Canada. As you can see from our correspondence to Mr. Cullgren, the Board is concerned that whatever rights and privileges that are extended to Canadian national attorneys practicing in Michigan be conditioned on reciprocal treatment from Michigan attorneys by the law society of upper Canada. [Emphasis added].

....Dear Mr. Cullgren:

... For a number of years, the Board has required that Canadian nationals obtain a permanent resident visa otherwise known as a green card in order to meet the residency requirement. Application of this rule has been complicated by a 'catch 22' glitch in the immigration law, as well as the existence of other forms of non-immigrant visa, including 'trade Canada' visa now available under the U.S./Canadian Free Trade Agreement. [Emphasis added].

Canadian nationals otherwise entitled to admission in Michigan seeking a green card or any number of other type visas, see Dingemans v Board of Board Examiners, 568 A 2d 354 (VT, SCT, 1989), must actually have the license to practice before qualifying for the visa. In order to be eligible for admission, one must be a resident of the United States, MCLA 600.934 hence, the dilemma... .

In response to the foregoing, Dennis Donohue and the

State Board of Law Examiners were put on notice of the legal invalidity of their residency requirements and the fact that no such requirement is contained in the controlling rules for admission established by the Michigan Supreme Court in the "Rules for the Board of Law Examiners", 1-2.

Dennis Donohue, on behalf of the State Board of Law Examiners, responded by reaffirming the applicability of the residency requirements of MCL 600.934(1) indicating that:

> This is to inform you that applicants for the admission to practice law in Michigan must comply with both the rules for the Board of Law Examiners and MCL 600.901/MCL 600.949... . [Emphasis added].

In response thereto, the Petitioner filed a direct action with the Michigan Supreme Court for an Order of Mandamous/Superintending Control compelling the State Board of Law Examiners to admit the Petitioner on State and Federal Constitutional grounds. The State Supreme Court denied the Petitioner's request without opinion, without reply or supplemental briefing by the parties, and without benefit of oral argument.

REASONS FOR GRANTING THE WRIT

I. THIS IS A MATTER OF FIRST IMPRESSION, INVOLVING AN ISSUE OF NATIONAL/ INTERNATIONAL IMPORTANCE WHICH REQUIRES UNIFORMITY AMONG THE STATES, AND THE STATE AND FEDERAL COURTS WHICH DEAL WITH THE ISSUE THROUGHOUT OUR STATES AND NATION.

This case presents the important legal question of whether a State may lawfully enforce a "permanent residency requirement" as a condition precedent to the licensure of a Trade Canada visa holder for the practice of law, for purely economic protectionist purposes, where the act of meeting the permanent residency requirement would violate the terms of the TC visa itself and could subject the visa holder to immediate deportation or expulsion.

Appellate Courts addressing this issue, in a similar context, have consistently rejected such residency requirements on Federal Constitutional grounds. See Dingemans v Board of Bar Examiners, 568 A 2d 354, 356-357 (VT, 1989) (a denial of a legal alien's admission to the Vermont Bar soley because the alien is not a permanent resident of the U.S. poses a burden on the Federal Immigration program which was not contemplated by Congress and, thus, violates the supremecy clause of the U.S. Constitution); Application of Sabinus Megwa, Docket No. 81-0263 (La Supreme Court, 1981); Barnard v Thorsten, 109 S. Ct. 1294 (1989); Frazier v Heebe, 107 S. Ct. 2607 (1987); Supreme Court of Virginia v Friedman, 108 S. Ct. 2260 (1988). The U.S. Supreme Court has also rejected citizenship requirements which have the same effect. See In Re: Griffiths, 93 S. Ct. 2851 (1973); Takahashi v Fish and Game Commission, 68 S. Ct. 1138, 1142-1143 (1948); and Graham v Richardson, 91 S. Ct. 1848, 1854-1856 (1971).

The Michigan Supreme Court's decision, in the case sub judice, conflicts with the rule of law set forth above in the analogous authority, i.e., authority dealing with analogous principles and identical perceived evils.

II. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE PERMANENT RESIDENCY

REQUIREMENTS OF MCL 600.934(1) TO APPLICANTS OF THE STATE BAR OF MICHIGAN IS UNCONSTITUTIONAL ON ITS FACE, OR AS APPLIED TO THE PETITIONER, UNDER THE CIRCUMSTANCES PRESENTED.

A. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENTS OF MCL 600.934(1) TO THE PETITIONER VIOLATES THE FEDERAL SUPREMACY CLAUSE.

This Court has long recognized that while the power of the states to regulate the practice of law is broad, it is not without limits. See Johnson v Avery, 393 U.S. 483, 490 (1969) **(the power of the states to control the practice of law cannot be exercised so as to abrogate federally protected rights);** Brotherhood of Railroad Trainmen v Virginia Ex Rel Virginia State Bar, 377 U.S. 1, 6 (1964) **(in regulating the practice of law, a state cannot ignore the rights of individuals secured by the Constitution);** and see State Bar v Cramer, 399 Mich 116, 134 (1976). State Legislative pronouncements which conflict with an individual's federally protected rights, or which conflict with federal restrictions, are considered to be invalid and unenforceable as a matter of law. Id.

These limitations are important in this context, because Article I, § 8 of the U.S. Constitution provides in pertinent part that:

> **The Congress shall have the power to....establish a uniform rule of naturalization....**

Appellate Courts interpreting this provision have consistently recognized that it establishes the federal

government's supreme authority to regulate the status and conduct of legal aliens, both immigrant and non immigrant, who are within the jurisdiction of the United States. See Toll v Moreno, 485 U.S. 1, 9-14; 102 S. Ct., 2977, 2982-2984 (1982); Mathews v Diaz, 426 U.S. 67 78-88; 96 S. Ct. 1883, 1890-1895, F 17, 24 (1976); Graham v Richardson, 403 U.S. 365, 377-380; 91 S. Ct. 1848, 1854-1856 (1971); Takahashi v Fish and Game Commission, 334 U.S. 410, 418-420; 68 S CT 1138, 1142-1143 (1948); and Dingemans v Board of Law Examiners, 568 A 2d 354, 356-357 (VT, 1989).

Consistent therewith, Congress has acted to statutorily regulate the admission, domicile and professional/employment activities of legal aliens, both immigrant and non immigrant, at 8 U.S.C. 1101, et. seq. In doing so, Congress has specifically recognized that legal aliens in this country, both immigrant and non immigrant (resident and non-resident), may engage in a full panoply of business and professional activities at the state level, including the practice of law, medicine and architecture, etc. Id.; §1101(a)(32); and see Dingemans, supra at 556. Congress has also established certain limitations, however, on a legal alien status which can affect the alien's continued ability to practice his or her profession within our country. **For instance, non immigrant (non-resident) Canadian professionals, such as the Plaintiff, are specifically prohibited from establishing a permanent residence or domicile within the United States as a condition for their continued qualification for a Trade Canada or TC Visa, under 8 U.S.C. § 1184(e) and 8 CFR, Chapter 1, § 214.6(3). The establishment of a permanent residence or domicile in the U.S. by a TC Visa holder would constitute a violation of the condition of the TC Visa, which would give the Department of Immigration a right to revoke the Visa and to deport the TC Visa holder. 8 U.S.C 1101, et. seq.**

MCL 600.934(1) notwithstanding, Article VI, Clause 2 of the U.S. Constitution provides that:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. (emphasis added.)

This Court, in interpreting this Section, combined with the requirements and limitations of Article I, Section 8, Clause 4 of the U.S. Constitution and 8 U.S.C. § 1101, et. seq., has consistently recognized that the federal rule is supreme in this context, and that states statutes, regulations, or state intepretations of state statutes or regulations that discriminate against aliens lawfully admitted to this country are invalid if they impose additional burdens on legal aliens not contemplated by Congress under 8 U.S.C. § 1101, et. seq. See Toll v Moreno, 458 U.S. 1, 11-14; 102 S. Ct. 2977, 2982-2984 (1982). Takahashi v Fish and Game Commission, 334 U.S. 410, 418-420; 68 S. Ct. 1138, 1142-1143 (1948); and Graham v Richardson, 403 U.S. 365, 377-380; 91 S. Ct. 1848, 1854-1856 (1971). The permanent residency requirement established by the Michigan Legislature under MCL 600.934(1), and subsequently enforced by the State Board of Law Examiners against the Petitioner, places an impermissible burden on the Petitioner's non-immigrant (non-resident) Canadian professional status under 8 U.S.C. § 1184(e) and 8 CFR, Chapter 1, § 214.6(3), and the Federal Immigration Progam as a whole, which was not contemplated by Congress. If the Petitioner acquiesces to the desires of the State Board of Law Examiners and declares himself to be a domicillary/permanent resident of the United States, or one of its territories, he will lose his right to be in this country

under his TC Visa--thus subjecting himself to immediate deportation. It is, therefore, violative of the Supremacy Clause of the U.S. Constitution. Id.; and See Dingemans v Board of Bar Examiners, 568 A 2d 354, 356-357 (VT, 1989) **(a denial of a legal alien's admission to the Vermont Bar solely because the alien is not a permanent resident of the U.S. imposes a burden on the Federal Immigration Program which was not contemplated by Congress and, thus, violates the Supremacy Clause of the U.S. Constitution)** Application of Sabinus Megwa, Docket No. 81-0263 (LA S. Ct., 1981); Truax v Raich, 239 U.S. 33, 41-42; 36 S. Ct. 7, 10-11 (1915); In Re: Griffiths, 413 U.S. 717; 93 S. Ct. 2851 (1973); and Teitscheid v Leopold, 342 F. Supp. 299, 302-303 (DC VT, 1971).

The permanent residency requirements of MCL 600.934(1) may not, therefore, be applied as a condition of licensure to this Petitioner, as a holder of a non-immigrant (non-resident) TC Visa under 8 U.S.C. § 1184(e)--as a matter of federal law. Id.; op cit.

B. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENTS OF MCL 600.934(1) TO THE PETITIONER VIOLATES THE PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION.

The XIV Amendment to the U.S. Constitution provides in pertinent part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor deny any person within its jurisdiction equal protection of the laws.

Federal and State Courts interpreting the Equal Protection Clause of the XIV Amendment have consistently recognized that **aliens (both legal and illegal), both immigrant and non immigrant, are entitled to the due process and equal protection of our laws once they have voluntarily subjected themselves to the jurisdiction of the United States or one of the states of the union.** See Plyler v. Doe, 102 S Ct. 2382, 2392-2394 (1982) (the phrase "within its jurisdiction was intended in a broad sense to offer the guarantee of equal protection to all within a state's boundaries, and to all upon whom the state would impose the obligations of its laws . . . Use of the phrase within its jurisdiction thus does not detract from, but rather confirms, the understanding that the protection of the 14th Amendment extends to anyone, citizen or stranger, who is subject to the laws of a state, and reaches into every corner of the states' territory . . .); Glicker v. Michigan Liquor Control Commission, 160 F2d 96, 98-100 (CA6, 1947) (the equal protection of law clause of the 14th Amendment extends its protection to any person subject to the jurisdiction of the state and is a right in itself, independent of the rights protected by the privileges and immunities clause which is restricted to citizens of the United States . . . Intentional discrimination by a state against a person subject to its jurisdiction violates the equal protection of laws clause of the 14th Amendment, although it may not violate the privleges and immunities clause); U.S. v. Verdugo-Uriquidez, 110 S Ct 1056, 1063-1064 (1990) **(once an alien voluntarily comes within the jurisdiction of the United States and begins to develop substantial connections with this country he or she may enjoy our constitutional protections)**; Russian Volunteer Fleet v. U.S., 51 S Ct 229 (1931); Landon v. Plasencia, 103 S Ct 321, 329 (1982) (once an alien voluntarily gains admission to our country his constitutional status changes); Johnson v. Eisentrager,

70 S Ct 936, 940 (1950) (the alien has been accorded a generous and ascending scale of constitutional rights as he increases his identity with our society); Mathews v Diaz, 426 U.S. 67, 78; 96 S. Ct. 1883, 1890 (1976); El Souri v DSS, 429 Mich 203, 208-210 (1987); Carlson v Landon, 342 U.S. 524, 535; 72 S. Ct. 525, 531 (1952) (When legally admitted, they have come at the nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals, they are entitled in their persons and effects to the protection of our laws); Yick Wo v Hopkins, 118 U.S. 356; 6th S. Ct. 1064, 1070-1072 (1886); Ambach v Norwick, 441 U.S. 71, 72-74; 99 S. Ct. 1589, 1592-1593 (1979); and Graham v Richardson, 403 U.S. 365; 91 S. Ct. 1848 (1971). **The Courts make no XIV Amendment distinction between residents, non residents, immigrant or non immigrant aliens,** once the alien has voluntarily made him or herself subject to our jurisdiction and begins to develop substantial connections with our society. Id.; Mathews v Diaz, 426 U.S. 67, 78-86; 96 S. Ct. 1883, 1890-1894 (1976); Martinez v Fox Valley Buslines, 17 Fed. Sup. 576 (DC il (sic) 1936); and Commercial Standard Fire Marine Co v Galindo, 484 SW. 2d 635, 636-637 (Texas App., 1972). **The only recognized and acceptable XIV Amendment distinction, between such aliens is based upon their legal or illegal status.** See El Souri v DSS, 429 Mich 203, 208-210 (1987); Doe v Department of Social Services, 439 Mich 650, 662 FN 19 (1992); Plyler v Doe, 457 U.S. 202; 102 Supreme Court 2382 (1982); and Nowak, Rotunda and Young, Constitutional Law, (3d Edition) pp. 630-632.

1. THE PETITIONER HAS VOLUNTARILY MADE HIMSELF SUBJECT TO STATE AND FEDERAL JURISDICTION AND HAS BEGUN TO DEVELOP SUBSTANTIAL CONNECTIONS WITH OUR SOCIETY.

The Petitioner voluntarily and deliberately came to Michigan to study law at the Detroit College of Law. The Petitioner voluntarily and deliberately took the Michigan bar exam in July of 1990, in an attempt to be admitted to the Michigan bar. In addition, the Petitioner has been admitted to practice before the U.S. District Court for the Eastern District of Michigan-concerning the local affairs of any Florida clients on a pro hac vice basis. The Petitioner has set up a local business office at 1612 Penobscot Building, in Detroit, Michigan. The Petitioner is in the process of building his local business and commercial contacts with both U.S. and Canadian firms who are attempting to expand their sales/services in to the other's local economy, e.g. Michigan and Ontario markets, as the result of the federal adoption of the U.S. Canadian Free Trade Agreement. The Petitioner uses his Penobscot business office to foster these connections.

These facts are important, because the Federal District Court in Keenan v. Board of Law Examiners of the State of North Carolina, 317 F Supp 1350, 1355 FN4 (DC NC, 1970) has recognized that a non-resident bar applicant is granted federal 14th Amendment equal protection guarantees by subjecting him or herself to the local licensing procedures of the subject state, indicating in part that:

> Because the Plaintiffs were not residents of North Carolina when this suit was filed, the board argues that they lack "standing" under the Equal Protection clause, which requires the no state 'denied any person within its jurisdiction the equal protection of the laws.' Suffice it to say that Plaintiffs have submitted to state jurisdiction by seeking a license from the Board of Examiners. This is sufficient to invoke for them the protection of the 14th Amendment . . .

The same should be true in the present case as well.

In addition, these facts are important in light of the jurisdictional qualifications set forth under Michigan law at MCL 600.705. MCL 600.705 provides that:

> The existance of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis or jurisdiction to enable a Court of record of this state to exercise limited personal jurisdiction over the individual and to enable the Court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:
>
> 1. The transaction of any business within the state; ...
>
> 3. The ownership, use, or possession of real or tangible personal property situated within the state... .
>
> . . .

Courts interpreting this section having given it a very expansive definition, subject only to the limits of constitutional due process. See Chicago Blower Corporation v. Air Systems Associates, 623 F2d 798 (ED Mich, 1985) (a Canadian domiciliary's contacts with Michigan were sufficient to subject him to the jurisdiction of the Michigan Courts); Sifers v. Horen, 385 Mich 195 (1971); and Gooley v. Jefferson Beach Marina, 177 Mich App 26 (1989).

By definition, therefore, the Petitioner's transaction of business within this state pursuant to his TC Visa, at his Detroit, Michigan business office, combined with his possession and use

of his in state rental property at the Detroit, Michigan business office located in the Penobscot Building, makes him subject to the limited personal jurisdiction of the State of Michigan and/or the U.S. Government as a matter of law. (Id).

2. THE STATE BOARD OF LAW EXAMINERS APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENT OF MCL 600.934(1) TO THE PETITIONER IS NOT NECESSARY (OR NARROWLY TAILORED) TO SERVE A COMPELLING STATE INTEREST.

A legal alien, such as the Petitioner, is considered to be a part of a "suspect class", and, therefore, entitled to virtually absolute constitutional protection against state fostered discrimination. Op cit; Bernal v Fainter, 467 U.S. 216; 104 S. Ct. 2312, 2315-2316 (1984) and Graham v Richardson, 403 U.S. 365, 372; 91 S. Ct. 1848, 1852 (1971). An illegal alien is considered to be part of only a "quasi suspect class" and is, therefore, entitled to only an intermediate form of heightened constitutional protection against state fostered discrimination. See Plyler v Doe, 457 U.S. 202; 102 Supreme Court 2382 (1982); and El Souri v DSS, at 208-209. The Petitioner, James A. Scarfone, is a legal alien and holds a valid TC Visa.

A state statute or regulation, or any part thereof, which purposefully discriminates, e.g. differentiates between citizens and non citizens, against legal aliens, like the Plaintiff (whether directly or as applied) is valid, if at all, only if the state demonstrates that its classification scheme is narrowly tailored to serve a compelling state governmental interest. Bernal v Fainter, supra; Graham v Richardson, supra. That is to say, appellate courts examining this issue have consistently held that state

classification systems or schemes which are directed at aliens and which harm only aliens, are invalid per se, unless they are found to be necessary to serve a compelling state interest. See El Souri v. DSS, 429 Mich 203, 211-212 (1987); Nyquist v. Mauclet, 97 S Ct 2120, 2125 (1977); and Graham v. Richardson, supra; and Mathews v. Lucas, 96 S Ct 2755, 2762 (1976). This is true even in those cases where, as here, not all aliens are adversely affected by the classification system or scheme adopted. (Id); El Souri at 211 (however, the fact that all aliens are not affected by the DSS policy has no bearing on our equal protection analysis).

In the case sub judice, the State Board of Law Examiners has repeatedly stated that all applicants to the State Bar of Michigan must be permanent residents of one of the U.S. states, its territories, or the District of Columbia in order to qualify for admission to the Michigan bar. This Court has repeatedly held, however, that such residency requirements are constitutionally invalid under the privileges and immunities clause of Article 4, Section 2 of the U.S. Constitution, when applied to U.S. citizens. See Barnard v. Thorstenn, 109 S Ct 1294 (1989); Supreme Court of Virginia v. Freedman, 108 S Ct 2260 (1988); Frazier v. Heebe, 107 S Ct 2607 (1987); and Supreme Court of New Hampshire v. Piper, 105 S Ct 1272 (1985). As a consequence, the only persons subject to the Board's use of the residency requirement of MCL 600.934(1) are aliens. (Id; Op Cit.). And, more importantly, the only persons adversely affected by the board's use of the residency requirements of MCL 600.934(1) are non-resident aliens. (Id). As a consequence, the board's use of the residency requirements of MCL 600.934(1) is legally invalid unless this Court finds that such requirements are necessary (and narrowly tailored) to serve a compelling state interest. See El Souri, supra; and Niquis, supra.

Such a finding is impossible in the context presented. This is true, because generally speaking, **a state classification**

system, such as the one sub judice, which interferes with a legal alien's ability to work in his or her chosen profession is considered to be violative of the Equal Protection Clause of the XIV Amendment, per se. See El Souri v DSS, at pp. 208-209; Nowak, Rotunda and Young, Constitutional Law (3d Ed., p. 631); and Ambach v Norwick, 441 U.S. 71, 73-75; 99 S. Ct. 1589, 1592-1593 (1979), which pointed out that:

> **The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unwaivering line over the years. State regulation of the employment of aliens long has been subject to constitutional constraints.**
>
> In Yick Wo v Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1866), the Court struck down an ordinance which was applied to prevent aliens from running laundries, and in Truax v Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915), a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's right to work for a living in the common occupation of the community.... At the same time, however, the Court also has recognized a greater degree of latitude for the states when aliens were sought to be excluded from public employment. At the time Truax was decided, the governing doctrine permitted states to exclude aliens from various activities when the restriction pertain to the 'regulation or distribution of the public domain, or of the common property or resources of the people of the state', Id., at 39, 36 S. Ct., at 10. Hence, as part of a larger authority to forbid aliens from owing land, Frick v Webb, 263 U.S. 326, 44 S. Ct. 115, 68, L. Ed. 323 (1923); Webb v O'Brien, 263 U.S. 313, 44 S. Ct. 112, 68 L. Ed. 318 (1923); Porterfield v Webb, 263 U.S. 225,

44 S. Ct. 21, 68 L. Ed. 278 (1923); Terraca v Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); Blythe v Hinckley, 180 U.S. 333, 21 S. Ct. 390, 45 L. Ed. 557 (1901); Hauenstein v Linham, 100 U.S. 483, 25 L. Ed. 628 (1880); Harvesting Wildlife, Patsone v Pennsylvania, 232 U.S. 138, 34 S. Ct. 281, 58 L. Ed. 539 (1914); McCready v Virginia, 4 Otto 391, 94 U.S. 391, 24 L. Ed. 248 (1877); or maintaining an inherently dangerous enterprise, Ohio Ex Rel Clark v Deckebach, 274 U.S. 392, 47 S. Ct. 630, 71 L. Ed. 1115; (1927), states permissibly could exclude aliens from working on public construction projects, Crane v New York, 239 U.S. 195, 36 S. Ct. 85, 60 L. Ed. 218 (1915), and it appears, from engaging in any form of public employment at all, see Truax, supra, 239 U.S. at 40, 36 S. Ct. at 10.

Over time, the Court's decisions gradually have restricted the activities from which states are free to exclude aliens. The first sign that the court would question the constitutionality of discrimination against aliens even in areas affected with a 'public interest' appeared in Oyama v California, 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249 (1948). The Court there held that statutory presumptions designed to discourage evasion of California's ban on alien landholding discriminated against the citizen children of aliens. The same term, the court held that the 'ownership' a state exercises over fish found in this territorial waters 'is inadequate' to justify California in excluding any or all aliens who are lawful residents of the state from making a living by fishing in the ocean off its shores while permitting all others to do so.' Takahashi v Fish and Game Commission, 334 U.S. 410, 421, 68 S. Ct. 1138, 1144, 92 L. Ed. 1478 (1948). This process of withdrawal from the former doctrine culminated in Graham v Richardson, supra, [403 U.S.

365, 372, 91 S. Ct. 1848-1852, 29 L. Ed. 2d, 534 (1971)], which for the first time treated classifications based on alienage as 'inherently suspect and subject to close judicial scrutiny.' 403 U.S. at 372, 91 S. Ct. at 1852. Applying Graham, this court has held invalid statutes that prevented aliens from entering a state's classified civil service, Shugareman v Dougal, 413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973), **practicing law**, In re: Griffiths, 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910 (1973), working as an engineer, examining Board v Flores D'Otero, 426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976), and receiving state educational benefits, Nyquist v Mauclet, 432 U.S. 1, 97 S. Ct. 2120, 53, L. Ed. 2d 63 (1977). (emphasis added); and see Terrace v Thompson, 263 U.S. 197; 44 S. Ct. 15 (1923); Takahashi v Fish and Game Commission, 334 U.S. 410, 68 S. Ct. 1138 (1948) **(a state cannot adopt a classification system which prevents lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living. . . The XIV Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this county shall abide in any state on an equality of legal privileges with all citizens under non discriminatory laws.)** Yick Wo v Hopkins, 118 U.S. 356; 6 S. Ct. 1064, (1886); Truax v Raich, 239 U.S. 33; 36 S. Ct. 7, (1915); In Re: Griffiths, 413 U.S. 717; 93 S. Ct. 28 51 (1973); Teitscheid v Leopold, 342 F. Supp. 299, 302-303 (DC VT, 1971); Miranda v Nelson, 351 F Supp. 735, 740 (DC AZ 1972); Mohammed v Parks, 352 F. Supp. 518, 521 (DC MA 1973); and see In Re: Houlihan, 389 Mich 665 (1973).

The point to be made is that the permanent residency requirement of MCL 600.934(1), which the State Board of Law

Examiners is purposefully applying to preclude the Petitioner from being licensed to practice law in this jurisdiction, invidiously discriminates against the Petitioner as a legal non immigrant alien and is not narrowly tailored to serve a compelling state governmental interest. Id.; op cit and see Mathews v Diaz, 426 U. S. 67, 86; 96 S. Ct. 1883, 1894 (1976) **(a division by a state of the category of persons who were not citizens of that state into the subcategories of U.S. citizens and aliens has no apparent justification);** in Goldstein v City of Hamtramck, 227 Mich 263, 267-269 (1924) (a residency requirement as a condition of licensure has no legitimate justification and is constitutionally invalid per se);[1] and Cook Coffee Company v. Village of Flushing, 267 Mich 131 (1934).

3. THE STATE BOARD OF LAW EXAMINERS APPLICATION OF THE PERMANENT RESIDENCY REQUIREMENT OF 600.934(1) TO THE PETITIONER IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE.

The Petitioner has taken and passed the Michigan State Bar Exam. He is licensed to practice law in the State of Florida. In addition, he has met each of the express requirements set forth in the Rules for the State Board of Law Examiners. The only condition, if any, that the Plaintiff has not met is the

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[1]Discrimination between legal aliens and citizens, in the context presented, is a matter which is valid if and only if it results from actions or policies of the federal government and the federal government alone. See Mathews v Diaz, 426 U.S. 67, 78-88; 96 S. Ct. 1883, 1890-1895 (1976) and Toll v Moreno, 458 U.S. 1, 11-15; 102 S. Ct. 2977, 2982-2984 (1982).

purported permanent residency requirement set forth in MCL 600.934(1). The permanent residency requirement of MCL 600.934(1) is, as we have learned, not applicable to U.S. citizens- as a matter of law. See Barnard v. Thorstenn, 109 S Ct 1294 (1989).

These facts are important, because this Court has long recognized that the practice of law is not a matter of grace; but, rather it is a protected matter (whether as a privilege or a right) for those individuals, such as the Petitioner, who are qualified by learning and moral character, e.g. for those who have met the requirements of Rules 1 and 2 for the State Board of Law Examiners and who have passed the Michigan Bar Exam. See Baird v. State Bar of Arizona, 91 S Ct 702, 292 (1971); Schware v. Board of Bar Examiners, 77 S Ct 752, 756, FN5 (1957); citing Ex Parte Garland, 4 Wall 333, 379; 18 LED 366 (1867). As a consequence, any qualification that a state puts on a person's ability to practice law must be rationally connected with the applicant's fitness or capacity to practice law. Sestric v. Clark, 765 F2d 655 (CA7, 1985); Louis v. Supreme Court of Nevada, 490 F Supp 1174, 1182-1183 (DC Nevada, 1980).

An applicant's permanent residence, by definition, however is not rationally related to the applicant's fitness or capacity to practice law and is, therefore, said to be an invalid requirement, per se. See Keenan v. Board of Law Examiners of the State of North Carolina, 317 F Supp 1350, 1353-1356 (DC, NC, 1970); Potts v. Honorable Justices of Supreme Court of Hawaii, 322 F Supp 1392, 1397-1399 (DC Hawaii, 1971); Webster v. Wofford, 321 F Supp 1259, 1261-1262 (ND Georgia, 1970); and see the corollary rule and rationale set forth by the U.S. Supreme Court in Barnard v. Thorstenn, supra, at 1299-1302. This rule was recognized and applied by the Michigan Attorney General on behalf of "Barbers" as long ago as 1974. See 1974 Michigan Attorney General

Opinion No. 4830, pp. 181-185. (Residency requirements as a condition of licenses are unconstitutional). The same rule, and the same rationale, should be true on behalf of the Petitioner today. Id; Op Cit.

Recognition of this limitation, is important, given the fact that citizenship requirements as a condition of licensure for the practice of a profession have long been invalid under the equal protection clause of the 14th Amendment. See Takahashi, supra; and Truax, supra. This prohibition was specifically extended to the state licensure of attorneys by this Court in In Re Griffiths, 413 U.S. 717; 93 S Ct 2851 (1973). The Michigan Supreme Court acknowledged that prohibition in In Re Hulahan, 398 Mich 665 (1973), under facts strikingly similar to those presented in the case sub judice. The point to be made, is that there is no inherent legitimate distinction between a citizenship requirement for licensure and a permanent residency requirement for licensure. The two requirements should be treated the same for constitutional analysis purposes.

C. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE PERMANENT REQUIREMENTS OF MCL 600.934(1) TO THE PETITIONER VIOLATES THE FEDERAL COMMERCE CLAUSE.

The Federal Commerce Clause of Article 1, Section 8, of the U.S. Constitution provides in pertinent part that:

> The Congress shall have the power to. . . regulate commerce with foreign nations, and among the several states . . .

Appellate Courts interpreting this provision have

consistently recognized that the **Commerce Clause makes Congress' regulation of interstate and international commerce, e.g., commerce between the United States and a foreign nation, paramount and exclusive.** See CS XT, Inc. v Pitz, 883 F 2d 468 (CA 6, 1989); Campeau Corp v Federated Department Stores, 679 F. Supp. 735 (SD Ohio, 1988); Wardair Canada, Inc. v Florida Department of Revenue, 477 U.S. 1; 106 S. Ct. 2369 (1986); People v Boblo Excursion Company, 317 Mich 686 (1947); and Chicago, et al v Public Service Commission, 332 Mich 291 (1952). **A state may not, therefore, discriminate against trade with foreign countries by burdening foreign commerce, or by favoring its own local businesses, for purely economic protectionist purposes.** Id.; South Central Timber Development, Inc. v Wunnicke, 467 U.S. 82; 104 S. Ct. 2237 (1984); Japan Line Ltd v City of Los Angeles, 441 U.S. 434; 99 S. Ct. 1813 (1978); City of Philadelphia v New Jersey, 437 U.S. 617, 624-625; 98 S. Ct. 2531; 2535 (1978); and Bachus Imports, Ltd v Diaz, 468 U.S. 263, 268-272; 104 S. Ct 3049, 3053, 3055 (1984). States are limited to regulating local matters of purely local concern, which are not directly connected to matters of interstate or international commerce. Id.; and Lewis v BTINV Managers, Inc., 447 U.S. 27; 100 S. Ct. 209 (1980).

The Commerce Clause prohibits a state from using its regulatory power to protect its own citizens from outside competition. Id.; Op cit; See Lewis at 44; 2019. If Congress determines that Commerce between the United States and another nation is to be freely pursued, it is a matter of exclusive federal concern which may not be directly regulated or affected by state law even where the state determines that such free commerce is not, or would not be, beneficial to the state or to the state's businesses. Id.; Japan Line Ltd., supra; Wardair Canada, supra; South Central Timber Developmental, Inc., supra; Campeau Corp v Federated Department Stores, supra; and see the analyses set

forth in Toll v Mareno, 458 U.S. 1 11-14; 102 S. Ct. 2977, 2982-2984 (1982). **This is especially true in those situations where, as here, Congress has established a free or open trading policy with a foreign country which, thus, demands or requires uniform regulation among the various states.** See 19 U.S.C. 2112 (U.S. Canada Free Trade Agreement Implementation Act); Campeau Corp, supra **(The Commerce Clause will invalidate statutes which adversely affect interstate commerce by subjecting activities to inconsistent regulations)**; Amanda Acquisitions Court v Universal Foods Corp, 708 F Supp. 984 (In WIS, 1989) affirmed 877 F 2d 496; Morgan v Virginia, 328 U.S. 373, 377; 66 S. Ct. 1050 (1946); in Western Union v PSC, 127 Mich App. 88 93-94 (1983). The risk of inconsistent regulation among the states, where congress has acted to establish a uniform federal policy, invalidates the states statute or regulation as a matter of law. Id.; Op Cit; and CTS Corp v Dynamics Corp of America, 481 U.S. 69, 87-90; 107 S. Ct. 1637, 1648-1651 (1987).

In light of the foregoing, it is imperative to recognize that the conducting of commercial enterprises by Canadian professionals in the U.S. and the comcomitant transference of jobs, money, goods and services associated therewith between the United States and Canada, as encouraged by the U.S./Canada Free Trade Agreement, 19 U.S.C. 2112, et. seq., and as authorized by the Department of Immigration for TC visa holders, substantially affects international commerce between the United States and Canada. Likewise, the Petitioner's renting of a business situs in the United States, and the payment of rents to a U.S. landlord, as a Canadian national, combined with the Petitioner's efforts to engender future business between the United States and Canada substantially affects international commerce between the United States and Canada. Without the granting of a Michigan law license to the Petitioner, the Petitioner's efforts to cultivate potential corporate commercial

ventures between Windsor and Detroit will fail and Petitioner will be forced to give up his United States leasehold, and the resultant flow of commerce between the Petitioner, Canada and the State of Michigan will terminate.

Despite the foregoing, including the risk of inconsistent regulation among the states,[2] the State Board of Law Examiners has refused to license TC visa holders from Windsor Canada, such as the Petitioner, per se, and will continue to do so unless and until the Law Society of Upper Canada guarantees reciprocal licensure of U.S. nationals in Canada. Such a condition of licensure imposed by a state is invalid, per se, because the matter of reciprocal licensure is of purely federal concern, e.g., it is not a matter of legitimate local concern, since it involves a matter which is exclusively within the province of the U.S. government to negotiate with the Canadian government as a matter of law. Op cit; and see Mathews v Diaz, 426 U.S. 67, 79-80; 96 S. Ct. 1883, 1891, FN 12 (1891) and see 10 U.S.C. § 7435(a) and 28 U.S.C. § 2502.

In addition, even if the reciprocal licensure of U.S. Canadian nationals legitimately involves a matter of local concern, the State Board of Law Examiners' enforcement of the residency requirements of MCL 600.934(1) are invalid in the context presented, because they are being applied for a purely economic protectionist purpose, e.g. to protect Michigan attorneys

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[2]Clearly, there is much more than simply the abstract risk of inconsistent state regulation concerning the licensure of the Petitioner as a TC visa holder. The State of Florida has licensed the Petitioner to practice law. Hence, the risk of inconsistent state regulation concerning the licensure of TC visa holders is a reality, at least as applied to this Petitioner.

from the economic competition of Canadian foreign nationals, where Michigan attorneys are not arguably guaranteed the reciprocal right to practice law in Canada. Id; Op cit; and see A&P Tea Company, supra. Such a requirement constitutes nothing more than a state generated retaliatory tariff. (Id). Such tariffs are invalid, as a matter of law, no matter now purportedly noble the local purpose. (Id).

Hence, the State Board of Law Examiners' application of the residency requirements of MCL 600.934(1) to this Petitioner (under the circumstances) violates the restrictions imposed by the Federal Commerce Clause. Id; Op cit

III. THE STATE BOARD OF LAW EXAMINERS' APPLICATION OF THE RESIDENCY REQUIREMENTS OF MCL 600.934(1) TO THE PETITIONER VIOLATES THE PETITIONER'S FEDERAL STATUTORY RIGHTS PROTECTED BY 42 U.S.C. § 1981.

42 U.S.C. § 1981 provides in pertinent part that:

> All persons within the jurisdiction of the United States shall have the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens... .

Appellate Courts interpreting this provision have consistently applied it as the federal statutory equivalent of the Equal Protection Clause of the XIV Amendment to the U.S. Constitution, as applied to state action in the context presented. See Graham v Richardson, 403 U.S. 344, 377-380; 91 S. Ct. 1848, 1854-1856 (1971); Takahashi v Fish and Game Commission, 334 U.S. 410, 419-421; 68 S CT 1138, 1142-1143 (1948); Yick Wo v Hopkins, 118 U.S. 356; 6th S. Ct. 1064,

(1886); Roberto, et al v Hartford Fire, et al, 177 F. 2d 811 (CA 7, 1949). Both the Equal Protection Clause of the XIV Amendment and 42 U.S.C. § 1981 protects legal aliens, such as the Petitioner, from state-sponsored, or "de jure", discrimination. Id.; and see Bhandari v First National Bank of Commerce, 801 F. 2d 1082 (CA 5 1987).

More specifically, § 1981 prohibits the purposeful or intentional denial of a legal alien's right to work or practice in his or her chosen profession, based upon their alienage alone, absent a compelling state governmental interest. Id.; op cit. The permanent residency requirement of MCL 600.934(1), and the State Board of Law Examiners' intentional application of those requirements to the Petitioner, denies the Petitioner an opportunity to practice in his chosen profession within this state solely because he is not a U.S. citizen and/or U.S. domiciliary. As noted with the analysis of the Equal Protection Clause arguments, set forth above in Subsection B, the residency requirements of MCL 600.934(1) are not narrowly tailored to serve or effectuate a compelling state governmental interest and are, therefore, invalid under 42 U.S.C. § 1981--as a matter of law. Op cit; and see Mathews v Diaz, 426 U.S. 67, 85-87, 96 S. Ct. 1883, 1893-1895 (1976).

CONCLUSION

WHEREFORE, the Petitioner, James A. Scarfone, prays that this Court grant his petition for a Writ of Certiorari to the Michigan Supreme Court.

GARAN, LUCOW, MILLER, SEWARD,
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Dated: September 16, 1993

APPENDIX A

ORDER ENTERED JUNE 22, 1993

JAMES A. SCARFONE,

Plaintiff,

v SC: 95443

STATE BOARD OF LAW EXAMINERS,

Defendant.

On order of the Court, the complaint for superintending control is considered, and relief is DENIED, because the Court is not persuaded that it should grant the requested relief.

Levin, J., would set this case for submission following briefing and orgal argument.

OCT 26 1993
OFFICE OF THE CLERK

No. 93-465

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1993

JAMES A. SCARFONE,

Petitioner,

v.

STATE BOARD OF LAW EXAMINERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Where Petitioner's case was filed below as an original proceeding in the Michigan Supreme Court, the record stands contested or undeveloped in certain relevant respects, and the Court denied the requested mandamus relief without opinion leaving the basis for decision subject to conjecture, should this Court grant certiorari?

II

Where the federal Office of the United States Trade Representative unequivocally advised the State of Michigan that nothing in the United States-Canada Free Trade Agreement requires a state to waive its residency requirements for admission to its bar for Canadian lawyers granted a United States temporary visa pursuant to that agreement's terms, did Petitioner, a nonresident of any state or territory of the United States or the District of Columbia, demonstrate in his original mandamus action a clear constitutional right to be admitted to the Michigan bar?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF REASONS FOR DENYING THE WRIT 7

REASONS FOR DENYING THE WRIT 9

I THE ORDER OF THE MICHIGAN SUPREME COURT DENYING PETITIONER'S REQUEST FOR MANDAMUS RELIEF WITHOUT OPINION PRESENTS NO CONFLICT WITH ANY DECISIONS OF OTHER STATE OR FEDERAL APPELLATE COURTS OR WITH THIS COURT'S DECISIONS AND IS, ACCORDINGLY, UNWORTHY OF REVIEW 9

II THE PETITION PRESENTS NO VITAL OR IMPORTANT ISSUE OF FEDERAL LAW IN NEED OF THIS COURT'S AUTHORITATIVE VOICE 15

III THE COURT BELOW CORRECTLY DENIED MANDAMUS RELIEF BECAUSE SECTION 934 OF THE RJA IS CONSTITUTIONAL UNDER BOTH THE SUPREMACY CLAUSE AND EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION 16

A. Supremacy Clause 16

B. Equal Protection Clause 20

IV THE COURT BELOW CORRECTLY DENIED MANDAMUS RELIEF BECAUSE SECTION 934 OF THE RJA IS CONSISTENT WITH THE DICTATES OF THE FEDERAL COMMERCE CLAUSE AND DOES NOT VIOLATE 42 USC § 1981 27

A. Commerce Clause 27

B. 42 USC § 1981 31

CONCLUSION AND RELIEF SOUGHT 33

TABLE OF AUTHORITIES

Pages

Cases

Ambach v Norwick,
441 US 68 (1979) 23

Bernal v Fainter,
467 US 216 (1984) 23

Carlson v Landon,
342 US 524 (1951) 23

Dingemans v Board of Bar Examiners,
152 Vt 494; 568 A2d 354 (1989) ...12-15

Graham v Richardson,
403 US 365 (1971) 23

In re Griffiths, 413 US 717 (1973) .. 23

In re Houlahan, 389 Mich 665;
209 NW2d 250 (1973) 12

Mathews v Diaz, 426 US 67 (1976) 23

Mitchell v Board of Law Examiners,
155 Mich 452; 119 NW 587 (1909) ... 2

Plyler v Doe, 457 US 202 (1982) 23

Schware v Board of Bar Examiners,
353 US 232 (1959) 25

Shelby Township Police and Fire
Retirement Board v Charter
Township of Shelby, 438 Mich 247;
475 NW2d 249 (1991) 2

Pages

Takahashi v Fish & Game Commission, 334 US 410 (1948) 23,24

Truax v Raich, 239 US 33 (1915) 24

United States v Verdugo-Urquidez, 494 US 259 (1990) 24

Yick Wo v Hopkins, 118 US 356 (1886) 24

Statutes

8 USC § 1101 et seq 16

8 USC § 1184(e) 17,18

42 USC § 1981 8,31,32

8 CFR, Chapter 1, § 214.6(b)(3) 17

8 CFR § 214.6(d) 18,29,31

8 CFR § 214.6(d)(2)(E) 18

8 CFR § 2143.6(d)(2)(ii) 19

Mich. Comp. Laws Ann. 600.934(1)...passim

Constitution

Art. VI, cl 2 16

Art. I, sec. 8 27

Court Rules

Michigan Court Rule 7.304 1

Michigan Court Rule 7.304(D) 9

STATEMENT OF THE CASE

Petitioner below challenged Michigan's statutory bar admission requirements in an original proceeding filed in the Michigan Supreme Court pursuant to Michigan Court Rule 7.304. His complaint for mandamus sought superintending control over the Michigan Board of Law Examiners (hereinafter the Board).

Under Michigan law, an applicant for admission to the bar bears the burden of proving that he or she has met each of the qualifications for admission to the bar, which qualifications are specified both by court rule and by statute. Mich. Comp. Laws Ann. 600.934(1). Mandamus relief under Michigan law is not available unless the plaintiff shows that he or she has a clear legal right to the relief requested and that the defendant

has a clear legal duty to grant the request. Shelby Township Police and Fire Retirement Board v Charter Township of Shelby, 438 Mich 247, 263; 475 NW2d 249 (1991). Moreover, the Board's exercise of discretion is not disturbed absent a clear showing that an abuse has occurred. Mitchell v Board of Law Examiners, 155 Mich 452, 454-455; 119 NW 587 (1909).

The residency requirement at issue in this case, which Petitioner concedes he does not meet, does not require residency in Michigan; rather, section 934 of Michigan's Revised Judicature Act, Mich. Comp. Laws Ann. 600.934(1) (hereinafter section 934 of the RJA), requires an applicant to show only that he or she "is a resident of 1 of the states or territories or the District of Columbia."

The record below consists largely of correspondence between Petitioner and the Board, which Petitioner has shared with this Court, and correspondence between the Board's counsel and the Office of the United States Trade Representative, which Petitioner has understandably failed to mention anywhere in his Petition. In this correspondence (Appendix A), the United States Trade Representative advised that "nothing in that Chapter [Chapter 15 of the United States-Canada Free Trade Agreement] requires a state to waive its residency requirements for admission to its bar for Canadian lawyers granted a U.S. temporary entry visa pursuant to that Chapter." (Defendant's Supplemental Brief Opposing Mandamus/ Superintending Control: Exhibit A, p. 1.)

While the record stands uncontested that Petitioner is a nonresident of any state or territory of the United States or the District of Columbia and holds a valid Trade Canada visa, the record is contested with regard to whether Petitioner has a business office in Detroit, Michigan and as to whether he pays Michigan property taxes through the payment of rent to a landlord. (Defendant's Answer to First Amended Complaint, ¶¶ 8, 10, 11.) In an attempt to demonstrate to the Michigan Supreme Court that Petitioner's case was not unique and carried an impact beyond Petitioner personally, he alleged without support that "at least three other native Canadians [had] obtained their Michigan law license despite being domiciled in Canada ... ." (First Amended Complaint,

¶ 69.) A review of the alphabetical roster of all licensed members of the Michigan State Bar revealed, however, that two of the three were not, in fact, so listed, and the third listed only a business address and not a residential address. (Answer to First Amended Complaint, ¶ 69.)

Finally, Petitioner is correct when he states that the Michigan Supreme Court decided his complaint without opinion and "without benefit of oral argument." Pet. 7. He fails to advise, however, that it was Petitioner himself who waived oral argument. (Plaintiff's Brief in Support of First Amended Complaint, Cover Page.) He is also plainly wrong when he asserts that his request was denied "without reply or supplemental briefing by the

parties." Pet. 7. In fact, the Board filed a 43-page brief opposing mandamus, with attachments, a supplemental brief opposing mandamus, and answers to both Petitioner's complaint and first amended complaint.

SUMMARY OF REASONS FOR DENYING THE WRIT

This Court should deny the Petition for several reasons. First, the case was initiated in an original proceeding for mandamus, is presented on an inadequate factual record, and generated a decision of the Michigan Supreme Court without opinion leaving the parties and this Court to speculate as to the basis for the decision below. Second, the procedural posture of the case limits the impact of the court's decision below to Petitioner alone and serves to underscore the absence of any important and vital federal issue or conflict of decisions created by this case. Third, the writ should be denied because of its unique facts, including the fact that the opinion of the federal Office of the United

States Trade Representative was provided in response to a request made in this case, which confirmed that no provision of the United States-Canada Free Trade Agreement displaces the state bar admission residency requirement at issue here. Finally, this Court should deny the writ because the court below correctly denied the mandamus relief requested, the Petitioner having failed to establish a clear legal right to be admitted to the bar of Michigan under either the Federal Constitution's Supremacy, Equal Protection, and Commerce Clauses or 42 USC § 1981.

REASONS FOR DENYING THE WRIT

I

THE ORDER OF THE MICHIGAN SUPREME COURT DENYING PETITIONER'S REQUEST FOR MANDAMUS RELIEF WITHOUT OPINION PRESENTS NO CONFLICT WITH ANY DECISIONS OF OTHER STATE OR FEDERAL APPELLATE COURTS OR WITH THIS COURT'S DECISIONS AND IS, ACCORDINGLY, UNWORTHY OF REVIEW.

Among the options available to the Michigan Supreme Court in considering an original complaint for mandamus seeking superintending control over the Michigan State Board of Law Examiners are to set the case for argument as on leave granted, to grant or deny the relief requested, or to enter another order it finds appropriate. Mich. Crt. Rule 7.304(D) (Appendix B). Although he carried the burden of proving entitlement to mandamus relief below, Petitioner waived oral argument in this case. In denying

the relief requested, the court below stated only that it was "not persuaded that it should grant the requested relief." Pet. App. 1a. Thus, no authoritative view of the Michigan Supreme Court addressing the constitutional arguments raised by Petitioner is presented in this case. Nor is there any precedent of Michigan's highest court which can be said to conflict with any appellate decisions, state or federal. At best, the parties can only speculate as to the shortcomings the court below found in Petitioner's case prompting its decision, including the possibility that Petitioner failed to carry his burden of proof under Michigan's law of mandamus. Such speculation does not serve as an adequate basis for this Court's consideration.

Even Petitioner concedes that the best "conflict" he can attempt to show is one "by analogy" only. Pet. 8. He points to cases in which state residency requirements were at issue and where citizenship requirements were imposed by the state. This case presents neither factual situation, however, and Petitioner's analogy fails as too remote.

Section 934 of the RJA at issue here requires residency in any state or territory or the District of Columbia, and not residency in Michigan exclusively, raising entirely different considerations than cases involving state residency requirements (where the Privileges and Immunities Clause is commonly at issue) and prompting an entirely different legal analysis. Moreover, Michigan has no

citizenship requirement for admission to the bar, the Michigan Supreme Court having held in 1973, by grant of a request for mandamus made by a native of Canada, that United States citizenship may not be imposed as a condition for admission to the practice of law consistent with equal protection. In re Houlahan, 389 Mich 665, 667; 209 NW2d 250 (1973).

Nor does Michigan's decision in this case conflict with Dingemans v Board of Bar Examiners, 152 Vt 494; 568 A2d 354 (1989). In Dingemans, the Vermont court held that the rule of admission challenged there, requiring that an applicant be a citizen of the United States or an alien who has been lawfully admitted to the United States for permanent residence, violated the Supremacy Clause of

the United States Constitution insofar as it denied admission to the Vermont bar "strictly on grounds of the alien status of an individual." 568 A2d at 357. No contrary holding of the Michigan Supreme Court was, or could have been, rendered in this case, because section 934 of the RJA has nothing whatever to do with citizenship. Thus, at best, Petitioner can only argue a conflict of results, which is an insufficient basis for this Court's consideration on certiorari.

Moreover, different results in the two cases are warranted by the different circumstances presented. In this case, in contrast to the facts in Dingemans: 1) a different kind of visa is involved (a Trade Canada visa and not an H-1 visa); 2) the visa was issued pursuant to

the terms of the United States-Canada Free Trade Agreement (not involved in Dingemans); and 3) the federal Office of the United States Trade Representative directly advised that nothing in the applicable chapter of that agreement required a state to waive its residency requirements for admission to its bar for lawyers granted a United States temporary entry visa (such as Petitioner's). The unique facts of this case distinguish it from Dingemans and all the other cases cited by Petitioner which alone should serve to disqualify it from certiorari review by this Court.

II

THE PETITION PRESENTS NO VITAL OR IMPORTANT ISSUE OF FEDERAL LAW IN NEED OF THIS COURT'S AUTHORITATIVE VOICE.

While the issues raised in the Petition may be of importance to Petitioner personally, a review of the cases cited in the Petition reveals that its issues are not of vital interest to the public generally or to numerous others. Petitioner cites to no other case (except Dingemans discussed above) involving a challenge to a state's bar admission requirement that an applicant reside in any state or territory of the United States or the District of Columbia, let alone numerous cases across the country or along our borders in which inconsistent rulings on constitutional issues speak to a need for this Court's final resolution and guidance.

III

THE COURT BELOW CORRECTLY DENIED MANDAMUS RELIEF BECAUSE SECTION 934 OF THE RJA IS CONSTITUTIONAL UNDER BOTH THE SUPREMACY CLAUSE AND EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

A. Supremacy Clause.

Petitioner is a legal, non-immigrant, nonresident alien. He argues that the federal government's authority to regulate the status and conduct of aliens serves to invalidate the residency requirements of section 934 of the RJA under the Supremacy Clause, Art. VI, cl 2 of the Federal Constitution, because such a requirement imposes an additional, impermissible burden on legal aliens seeking to practice law in Michigan not contemplated by Congress under 8 USC § 1101 et seq, the Immigration and Nationalization Law of 1952 (INA). As a

holder of a non-immigrant Trade Canada visa under 8 USC § 1184(e) and 8 CFR, Chapter 1, § 214.6(b)(3), he asserts section 934 of the RJA cannot be applied consistent with federal policy. Pet. 10-12.

Petitioner's argument, however, only selectively presents and therefore misapprehends the applicable federal policy and correctly failed to persuade the Michigan Supreme Court below. As shown infra, a full review of the applicable provisions compels the conclusion that the residency requirements of section 934 of the RJA are not only consistent with federal policy, they are expressly incorporated therein.

Under 8 USC § 1184(e), a Canadian citizen may be admitted into the United

States to engage in business activities at a professional level "under [promulgated] regulations of the Attorney General." The applicable regulation is 8 CFR § 214.6(d) under which an applicant for admission "shall present" documentation demonstrating engagement in business activities at a professional level and demonstrating professional qualifications. Nowhere discussed in the Petition is 8 CFR § 214.6(d)(2)(E) which specifies that the documentation "shall fully affirm ... [t]hat the Canadian citizen complies with all applicable state laws and/or licensing requirements for the business activity to be engaged in ... ." Even more specific is Schedule 2 to Annex 1502.1 of the United States-Canada Free Trade Agreement referenced in 8 USC § 1184(e) which lists each profession

covered by the agreement and the "minimum requirements" for each. 8 CFR § 2143.6(d)(2)(ii). Lawyers are listed on Schedule 2 as being required to show, at a minimum, that they are a "member of bar in province [for U.S. applicants] or state [for Canadian applicants]" and holding either an "L.L.B., J.D., L.L.L., or B.C.L."

These federal policies, as advised by the Office of the United States Trade Representative, by no means operate to displace or invalidate state licensing requirements, including residency requirements; to the contrary, they affirmatively incorporate them. Petitioner's visa presumably affords him the opportunity to practice law in Florida where he alleges he is a member of the

bar in good standing. Pet. 4. His visa does not, however, qualify Petitioner to practice law in every state of the United States, including Michigan, where he does not meet all licensing requirements, merely because he is lawfully admitted to practice in one state where he presumably has met all requirements. Petitioner's interpretation is directly contrary to federal immigration policy and correctly failed to persuade the court below.

B. Equal Protection Clause.

Petitioner contends that as a legal, nonresident alien, he is a member of a "suspect class" against whom section 934 of the RJA invidiously discriminates without serving a compelling state governmental interest. Pet. 17. The two premises on which Petitioner's entire

argument is based are that: 1) section 934 of the RJA creates a classification based on alienage and must therefore withstand strict scrutiny analysis; and 2) the cases analyzing equal protection challenges make no "distinction between residents, non residents, immigrant or non immigrant aliens ... ." Pet. 14. Because both of the principles forming the foundation of Petitioner's position are erroneous, his equal protection argument was correctly found unpersuasive by the court below and should not be a basis for granting certiorari in this case.

Regarding the classification at issue, Petitioner is simply in error when he characterizes the residency requirement of section 934 as a classification based on alienage. Neither alienage nor

citizenship forms the basis for the state's classification in section 934 of the RJA; only residency is involved. It is not Petitioner's status as an alien that prevented him from qualifying for licensure, but rather his failure to demonstrate that he resided in any state or territory of the United States or the District of Columbia. A United States citizen permanently residing abroad, for example, would not meet the residency requirement of section 934 although not an alien, whereas a legal alien residing in any state of the United States would be eligible for licensure completely irrespective of his or her status as an alien. Petitioner's suggestion that only aliens are subject to the residency requirements of section 934 (Pet. 18) is unsupportable because it confuses laws

requiring residency in a particular state, found invalid under the Privileges and Immunities Clause, with laws such as section 934 of the RJA requiring only residency in any state or territory.

While Petitioner's citation to cases addressing the constitutionality of classifications based on alienage are therefore inapposite, nevertheless even those citations address themselves only to the equal protection rights of resident aliens. See, e.g., Bernal v Fainter, 467 US 216 (1984); Plyler v Doe, 457 US 202 (1982); Ambach v Norwick, 441 US 68 (1979); Mathews v Diaz, 426 US 67 (1976); Graham v Richardson, 403 US 365, 371 (1971); In re Griffiths, 413 US 717 (1973); Carlson v Landon, 342 US 524, 529 (1951); Takahashi v Fish & Game Commis-

sion, 334 US 410 (1948); Truax v Raich, 239 US 33 (1915); Yick Wo v Hopkins, 118 US 356 (1886). See also United States v Verdugo-Urquidez, 494 US 259, 271 (1990) (listing cases in which this Court has held that resident aliens enjoy certain constitutional rights.)

Perhaps in recognition of his inability to cite a case in which a nonresident alien has been held entitled to the full breadth of benefits afforded under the Equal Protection Clause, Petitioner attempts to focus on what he describes as his jurisdictional ties to the United States. What Petitioner asserts in factual support of this claim, however, was not established or developed as part of the record below, but rather was put in issue by the Board. Therefore, this case

serves as an inadequate vehicle for consideration of Petitioner's Equal Protection argument by this Court.

Even assuming for the sake of argument, however, that Petitioner satisfied the jurisdictional requirements of the Equal Protection Clause and therefore had standing to challenge section 934 of the RJA, it is nevertheless constitutional. Section 934 is directed to residency, not alienage, and is therefore neither based on any suspect criteria nor does it impair a fundamental right. The statute is accordingly deemed constitutional if it is rationally related to a valid state objective. Schware v Board of Bar Examiners, 353 US 232 (1959). Michigan's interest in enacting section 934 is to protect the public and to assure a compe-

tent bar. By requiring residency in a state or territory of the United States, Michigan assures that attorneys are amenable to supervision and discipline and that its citizens are protected against attorney misconduct through the availablility of service of process and of assets subject to attachment to enforce judgments that may be obtained. Thus, the court below correctly denied Petitioner's request for mandamus.

IV

THE COURT BELOW CORRECTLY DENIED MANDAMUS RELIEF BECAUSE SECTION 934 OF THE RJA IS CONSISTENT WITH THE DICTATES OF THE FEDERAL COMMERCE CLAUSE AND DOES NOT VIOLATE 42 USC § 1981.

A. Commerce Clause.

Nothing in the Federal Constitution's article I, section 8 Commerce Clause bars the State of Michigan from applying its bar admission residency requirement to Petitioner.

The cases cited by Petitioner addressing Congress' regulation of interstate commerce and prohibition against state economic protectionism are inapposite because he cannot show that section 934 of the RJA has any negative impact on interstate commerce whatsoever. By its terms, section 934 requires that appli-

cants demonstrate residency in any state of the United States or any of its territories or the District of Columbia. Commerce between the states is, accordingly, in no way impaired by the act and Petitioner cannot show otherwise.

As to Petitioner's claim that Congress' authority to regulate commerce with foreign nations precludes Michigan from enforcing its licensing residency requirements, Petitioner relies on the United States-Canada Free Trade Agreement as the federal "free or open trading policy with a foreign country" which Michigan's statute allegedly contravenes. Pet. 26. However, for the same reasons stated in response to Petitioner's Supremacy Clause argument, his Commerce Clause argument fails as well. There is

no conflict or inconsistency between the federal trade policy and Michigan's residency licensure requirement; to the contrary, the two are consistent because the trade agreement as implemented contemplates and intends that states will have adopted licensing requirements for the particular business activity to be engaged in and that the visa holder has complied with "all [such] applicable state laws and/or licensing requirements." 8 CFR § 214.6(d) (emphasis added).

Petitioner's contested assertion that his payment of rent to a United States landlord and his efforts to engender future business between the United States and Canada "substantially affects international commerce" (Pet. 26) was insuffi-

cient to entitle him to mandamus relief below and should serve to deny review in this Court. None of the cases cited by Petitioner establishes that as a non-resident Canadian national he has standing to raise a Commerce Clause claim. Moreover, Petitioner is free to advance United States-Canada trade by practicing law and engendering business in the State of Florida where he has met the applicable requirements to engage in business activities contemplated by the agreement.

Finally, Petitioner argues that Canadian nationals should receive more favorable treatment on entering the United States to practice law than do American nationals on entering Canada. Again, in making this assertion, Petitioner reveals his misapprehension about

the federal policy embodied in the Free Trade Agreement. No provision of the agreement operates to validate residency requirements in Canada while invalidating such requirements in the United States; the requirements of each are expressly preserved. 8 CFR § 214.6(d).

B. 42 USC § 1981.

The Petitioner's final argument posits that he is entitled to admission to the Michigan bar because application of Michigan's residency requirement to him violates 42 USC § 1981. He prefaces his argument with the statement that 42 USC § 1981 is the "statutory equivalent of the Equal Protection Clause of the XIV Amendment to the U.S. Constitution ... ." (Pet. 28.) As the Board has discussed equal protection at length above, the

Court' attention is invited to that section as the Board's response to Petitioner's statutory argument which it incorporates here by this reference.

It bears repeating, however, that Michigan's residency requirement is a classification based on residence, and not on citizenship or alienage. Thus, as Petitioner asserts that § 1981 prohibits the purposeful denial of a legal alien's right to work based on alienage alone (Pet. 29), his reliance on this statute is misplaced.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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October 22, 1993

APPENDIX A

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

Susan I. Leffler, Esq.
Assistant Attorney General
State of Michigan
Department of Attorney General
P. O. Box 30212
Lansing, MI 48909

Dear Ms. Leffler:

Thank you for your letter, dated January 22, 1993, to Ambassador Kantor regarding state obligations in the legal services sector under the United States - Canada Free-Trade Agreement (CFTA). Ambassador Kantor has asked that I respond on his behalf.

Specifically, you asked whether any provision of the CFTA precludes Michigan from continuing to apply its residency

requirement to a non-resident Canadian national who applies for admission to the state bar of Michigan and who holds a TC-1 visa.

The two relevant chapters of the CFTA are Chapter 14 (Services) and Chapter 15 (Temporary Entry). Under Chapter 14, the United States and Canada undertook certain obligations regarding the cross-border provision of services. However, Chapter 14 applies only to those "covered services" listed in Annex 1408. Legal services are not among the services listed in this Annex and, therefore, are not subject to the requirements of Chapter 14.

Pursuant to Chapter 15, certain categories of Canadian professionals, including lawyers, meeting specified criteria may

be granted temporary admission to the United States to engage in the cross-border provision of their services. However, nothing in that Chapter requires a state to waive its residency requirements for admission to its bar for Canadian lawyers granted a U.S. temporary entry visa pursuant to that Chapter.

I hope this information is helpful. If you need any additional assistance, please feel free to contact me.

Sincerely,

/s/ Vanessa P. Sciarra
Vanessa P. Sciarra
Assistant General Counsel

cc: James A. Scarfone
2093 Ypres Boulevard
Windsor, Ontario

APPENDIX B

Michigan Court Rule 7.304
ORIGINAL PROCEEDINGS

(A) **When Available.** A complaint may be filed in the Supreme Court to implement the Court's superintending control power when an application for leave to appeal cannot be filed. A complaint for mandamus may be filed to implement the Court's superintending control power over the Board of Law Examiners, the Attorney Discipline Board, or the Attorney Grievance Commission.

(B) **What to File.** To initiate an original proceeding, a plaintiff must file with the clerk:

(1) 8 copies of a complaint;

(2) 8 copies of a brief conforming as nearly as possible to MCR 7.212(C);

(3) a notice of hearing, which must state that the complaint will be submitted to the Court on a date which is a Tuesday at least 21 days after the complaint is filed;

(4) proof that a copy of the complaint and brief was served on the defendant; and

(5) the fee provided by MCR 7.319(B)(7)(b).

Copies of documents, record evidence, or supporting affidavits may be attached as exhibits to the complaint. The complaint must be entitled: "[plaintiff] v. [Court of Appeals, Board of Law Examiners, Attorney Discipline Board, or Attorney Grievance Commission]," and the clerk is directed to re-entitle any papers otherwise entitled.

(C) Answer.

(1) The defendant must file 8 copies of an answer and a brief conforming with MCR 7.212(D) before the date the complaint is noticed for hearing. The defendant must serve 1 copy on the plaintiff and file proof of that service with the clerk.

(2) The grievance administrator's answer to a complaint for mandamus against the attorney grievance commission must show the investigatory steps taken and other pertinent information.

(D) Actions Against Attorney Grievance Commission; Confidentiality. The clerk shall keep the file in an action against the attorney grievance commission or the grievance administrator confidential and not open to the public if it

appears that the complaint relates to matters that are confidential under MCR 9.126. In the answer to a complaint, the grievance administrator shall certify to the clerk whether the matters involved in the action are deemed confidential under MCR 9.126. The protection provided by MCR 9.126 continues, unless the Court otherwise orders.

(E) Decision. There is no oral argument on the complaint. The Court may set the case for argument as on leave granted, grant or deny the relief requested, or enter another order it finds appropriate, including an order to show cause why the relief sought in the complaint should not be granted.